SUPREME COURT OF THE UNITED STATES.

No. 709, etc.—OCTOBER TERM, 1926.

The **Assigned Car Cases.** } Appeals from the District Court of the United States for the Eastern District of Pennsylvania.

[May 31, 1927.]

The separate opinion of Mr. Justice MCREYNOLDS.

A temperate and dependable statement concerning the scope and effect of the order here challenged, taken from the brief of counsel for appellees, is printed in the margin.* And see the carefully-prepared opinion of the court below, *Berwind-White Coal Mining Co. et al.* v. *United States*, 9 Fed. (2d) 429.

To me it seems plain enough that the real purpose of the order was not rationally to control distribution of cars during times of

*Privately-owned coal cars and cars furnished for railroad fuel coal, are collectively known technically as "Assigned Cars;" this by reason of the fact that they are assigned by the owner of the car (whether a railroad company obtaining coal for fuel, or a shipper owning cars used for the transportation of its coal) for loading at mines, either owned by the owner of the car or with which it has contracts for coal. Coal cars of railroad ownership, other than those assigned to the loading of railroad fuel coal, are known and will be referred to as "system cars."

Car-distribution rules assume importance only in times of car shortage; that is to say, when car orders exceed car supply. To provide for such periods the capacity of such mine is rated in cars per day. A mine may order cars each day up to but not exceeding its rated capacity and in time of a car shortage generally does so (even though it might not actually have equivalent orders for coal) in order that it may get as many cars as possible.

Under the practice now prevailing, but condemned by the Commission, all private cars (to the use of which system-car mines have no right,—that right being conceded to be exclusively in the owner of the car), and railway fuel cars are placed at the mine to which assigned even though such mine thereby receives cars to a greater extent of its rated mine capacity than is true of mines not having assigned cars. If such cars equal or exceed the *pro rata* of mine capacity to all cars on hand, such mines receive no system cars. It is only when such cars are less than such *pro rata* that such mines share in the distribution of system cars, and then only in such numbers as bring its

shortage, but to force railroads and other large consumers to apportion their purchases of coal among a larger number of producers and thus advantage mines from which such consumers preferred not to buy. Both carrier and large manufacturer must have steady supplies of suitable coal, and it may be highly important to obtain these from one or a few approved mines. But if such mines are to be denied fuel and private cars during times of shortage, then for their reasonable protection these great consumers probably will endeavor to scatter their orders.

The railroads of this country are private property. They must be operated by their owners according to law under supervision of the Interstate Commerce Commission; but that body is not intrusted with their management and ought not to be permitted to assume it under any guise. In practice, carriers must use many cars daily for gathering fuel necessary for their operations, and I know of no authority possessed by the Commission to prevent them from purchasing this where and as their managers think best. To permit such interference under the mere guise of a rule for distribution of cars seems to me altogether wrong.

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cars up to such *pro rata*. The distribution of system cars to system mines is of course based on the *pro rata* available. The effect of the Commission's order is to forbid a mine to have the use of any private cars or railway fuel cars in excess of the same proportion or *pro rata* of rated mine capacity to which mines not having assigned cars are able to receive cars.

In respect of railway fuel cars, the effect of the order under review is to prohibit the placement of such cars, in times of car shortage, at any mine owned by the railway company, or with which it has contracts for coal in sufficient numbers to load the output of such mines (or the proportion thereof taken by the railroad company for fuel purposes), provided the cars required for this purpose exceed the *pro rata* allotment of system cars, of which there is a shortage, at mines at which the company does not obtain fuel, and which, for the loading of their output, are dependent upon system cars.

In respect of private cars, the order prohibits any railroad, where there is a shortage of system cars, from placing private coal cars at any mine of the owner of such cars (or with which it has contracts for coal) in excess of the number of system cars placed on the same day at a mine of similar capacity, which is dependent upon system cars for its supply. The order applies irrespective of the number of such private cars available for placement and loading. It applies when the carrier has motive power and other facilities sufficient to move all available cars, both system and private, as well as when it has not.

The order is universal in its application and admits of no exception for any cause. It runs against every railroad in the United States, although as

Upon this record we must assume that the carriers have met their obligation to provide an adequate number of system cars.

The practice of hiring and using private cars by railroad has been recognized and accepted by both Congress and the Commission. It has enlarged the total number of cars available for use and thereby aided all shippers. Those who provide private cars take nothing from any other shipper, but heretofore have secured the use of such cars for themselves although, because of temporary shortage, the system cars were insufficient to meet the demands of others.

If the order was intended to enlarge the total supply of cars or bring about more equitable distribution of available cars in times of shortage, it was foolish. Supply cannot be increased, nor equitable distribution enforced, by prohibiting the use of private or fuel cars when most needed—requiring them to stand idle on the sidings. If, on the other hand, as I must think, the real purpose was to force large consumers to scatter their purchases, the order goes beyond any power intrusted to the Commission.

The decree below should be affirmed.

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to the conditions on many, including many coal-loading roads, there was no evidence.

Each of the appellees had found by experience that it could not rely on the coal equipment of the railroads to provide the daily supply of suitable coal necessary for its operation in times of periodic and recurring coal-car shortages, which shortages were due largely to the sudden expansion of orders for cars on the part of high-cost mines which operated irregularly and principally only in times when the coal business was exceptionally active. Each, therefore, became a private car owner to protect its coal supply at such times. The mileage allowances made for the use of such cars by the railroad are insufficient to pay for their upkeep. The only advantage in their ownership lies in their use in times of car shortage. The order thus deprives the respondents and other owners of private cars of all beneficial use thereof. . . .

The order does not require the resulting surplus of private cars to be appropriated for general use, and the Commission's report distinctly disclaims any power so to do. Unless the owner consents to such appropriation, however, cars which he owns and needs, and which he bought as a protection against system car shortages, must stand idle, even though the railroad company is able and willing to place and move such cars and all system cars available for loading as well.